IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-7002

EUGENE L. ADAMS,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion below is adequately set forth in the petition and is reported in 53 Ohio St. 2d 223 (1978).

Jurisdiction

Jurisdiction is adequately set forth in the petition, being invoked under Title 28, United States Code, Section 1257(3).

Questions Presented for Review

I. THE QUESTION OF WHETHER A PROPER PROCEDURE IS FOLLOWED BY THE OHIO STATUTORY SCHEME FOR IMPOSITION OF THE DEATH PENALTY HAS BEEN DECIDED BY THIS COURT IN LOCKETT V. OHIO, 438 U.S. _____ (1978).

II. WHERE PROOF OF GUILT IS OVERWHELMING, DOES TESTIMONY THAT AN ARRESTEE'S STATEMENT TO POLICE INCLUDED REFERENCE TO THE ARRESTEE BEING ON PAROLE, CONSTITUTE REVERSIBLE ERROR, OR IS SUCH ERROR HARMLESS BEYOND A REASONABLE DOUBT?

III. DOES THE DUE PROCESS CLAUSE REQUIRE CONSISTENCY IN VERDICTS BETWEEN SEPARATE COUNTS OF A MULTIPLE COUNT CRIMINAL INDICTMENT?

IV. DOES A NEWSPAPER ACCOUNT OF TRIAL PROCEEDINGS READ BY ONE JUROR IN A CRIMINAL CASE BUT NOT BY OTHER PANEL MEMBERS, REQUIRE A MISTRIAL OR MAY SUCH JUROR BE REPLACED BY AN ALTERNATE JUROR?

Statement of the Case

Petitioner was indicted by the Franklin County, Ohio, grand jury on one count of aggravated murder, the purposeful killing of another while in the course of an aggravated robbery, in violation of Ohio Revised Code Section 2903.01. Also charged in the indictment was aggravated robbery, Ohio Revised Code Section 2911.01.

After trial by jury in February 1976, petitioner was found guilty of the charge of aggravated murder and sentenced to death pursuant to Ohio Revised Code Sections 2929.02 through 2929.04.

The offense occurred the evening of September 13, 1975. Marlyn J. Darst, a clerk at "Wally's Carry-Out" was shot to death during an aggravated robbery of that store. Her ten-year-old daughter entered the store and saw her mother, who was lying on the floor, kick at a man who then shot Mrs. Darst twice with a gun.

Petitioner had altered both the color and style of his hair between the time of the murder and the trial and the witness was unable to identify him at trial. However, she did identify a photograph of petitioner from a group of six shown to her by police several days after the murder. She again picked that photograph in court. She identified a jacket as worn by the gunman. Other witnesses identified the jacket as worn by petitioner the night of the murders.

Three witnesses saw the assailant enter a getaway car. All descriptions of the vehicle were in agreement.

The day before the murder, David West rode to Lake Erie in a car which matched the description of the getaway car. With him were Tommy Deal (a co-defendant of petitioner), Margaret Etter and petitioner.

Having spent the night at Lake Erie, West testified that the party returned to Columbus, Ohio, on the evening of the following day. As they reached Columbus, petitioner "said something about hitting a place on High Street." (The store which was robbed and where the deceased was murdered is

located on South High Street). Petitioner and Deal left West and Etter at the home of West's sister. Both men left the house and returned shortly thereafter. West overheard petitioner admit he had shot a woman three times.

Margaret Etter testified petitioner was nervous and pale and that petitioner stated he shot the woman because she had kicked him. West's sister also testified that petitioner admitted shooting a woman.

Etter, West and Deal then took petitioner to Cincinnati, Ohio. Etter testified that during the trip, petitioner explained again that he had shot the woman because she kicked him and that a child had been present.

West testified that after leaving petitioner in Cincinnati, Etter and Deal then drove to Lake Erie "to go get an alibi." Upon return to Columbus, they stopped at West's home and were immediately confronted by Columbus police who arrested Deal and in searching the car, found a pistol under the seat. The parties stipulated that ballistics testimony would be that the bullets removed from the victim's body were fired from that gun.

Following jury trial, petitioner was found guilty. After a mitigation hearing, petitioner was sentenced to death. Full appellate review of both the conviction and sentence was accorded as a matter of right by both the Ohio Court of Appeals and the Ohio Supreme Court. At each level, the conviction was affirmed by unanimous decision. Petitioner now seeks a Writ of Certiorari from this Court.

Summary of Argument

I. IN LIGHT OF THE DECISION OF THIS COURT IN LOCKETT V. OHIO, 438 U.S. _____ (1978), THE PETITION SHOULD BE GRANTED AND JUDGMENT VACATED INSOFAR AS IT LEAVES UNDISTURBED THE DEATH PENALTY IMPOSED AND THE CASE REMANDED TO THE SUPREME COURT OF OHIO FOR FURTHER PROCEEDINGS.

II. WHERE PROOF OF GUILT IS OVERWHELMING, THE REPETITION AT TRIAL BY A POLICE OFFICER THAT AN ARRESTEE'S STATEMENT INCLUDED A REFERENCE TO THE ARRESTEE BEING ON PAROLE, DOES NOT CONSTITUTE REVERSIBLE ERROR AND IS HARMLESS BEYOND A REASONABLE DOUBT.

III. CONSISTENCY BETWEEN VERDICTS ON THE SEVERAL COUNTS OF AN INDICTMENT IS UNNECESSARY WHERE A DEFENDANT IS CONVICTED ON ONE OR SOME COUNTS BUT ACQUITTED ON OTHERS.

IV. EXCUSAL AND REPLACEMENT OF A JUROR WHO HAS READ A NEWSPAPER ACCOUNT OF A CRIMINAL TRIAL PROCEEDING DOES NOT CONSTITUTE ERROR. WHERE IN A VOIR DIRE INQUIRY THE TRIAL COURT DETERMINES THAT THE BALANCE OF THE PANEL HAD NOT READ THE NEWS ACCOUNT AND THE EXCUSED JUROR HAD NOT COMMUNICATED THE NEWS ACCOUNT TO OTHER PANEL MEMBERS, SUBSTITUTION OF AN ALTERNATE JUROR WHO HAD NOT READ THE NEWS ACCOUNT IS PROPER.

I. IN LIGHT OF THE DECISION OF THIS COURT IN LOCKETT V. OHIO, 433 U.S. _____ (1978) THE PETITION SHOULD BE GRANTED AND JUDGMENT VACATED INSOFAR AS IT LEAVES UNDISTURBED THE DEATH PENALTY IMPOSED AND THE CASE REMANDED TO THE SUPREME COURT OF OHIO FOR FURTHER PROCEEDINGS.

II. WHERE A DEFENDANT IN A CRIMINAL TRIAL VOLUNTARILY MAKES STATEMENTS TO THE POLICE WHICH ARE DESIGNED TO BE EXCULPATORY IN THE INVESTIGATIVE STATE OF THE PROCEEDINGS, SUCH STATEMENTS ARE ADMISSIBLE AT TRIAL, NOTWITHSTANDING THE FACT THAT IN A LATTER CONTEXT THEY MAY BE DAMAGING TO THE DEFENDANT'S CAUSE. IF ADMISSION OF SUCH STATEMENT IS HELD TO BE ERRONEOUS UNDER A STATUTE AND RULE OF EVIDENCE ON A STATE BASIS, SUCH ERROR CAN BE HARMLESS BEYOND A REASONABLE DOUBT.

We acknowledge that the Supreme Court of Ohio determined that the admission of a portion of petitioner's statement to police was error. We note that no constitutional issue is presented herein. Full compliance with the prophylactic rules of Miranda v. Arizona, 384 U.S. 436 (1966) was observed. The simple issue presented below and herein is whether the petitioner's statement (that he went to Cincinnati shortly after the homicide to see his parole officer) was so prejudicial as to warrant reversal of his conviction. Acknowledging that the Supreme Court of Ohio held the admission of the statement to be error based upon state law, we believe such error to be of non-constitutional dimension and to be harmless beyond a reasonable doubt.

As a general rule, where statements of an accused are admissible, the entire conversation is admissible to prove the context of the statement made. Wharton's Criminal Evidence, 13th Edition, Section 694, page 497. As stated in VII Wigmore on Evidence, 3rd Edition, Section 2100, page 493:

> "It is commonly said that the whole of the confession or admission must be taken together; but this obviously leaves unsettled whether it is meant that the prosecution must put it all in at first, or merely

> that the accused may call for or offer the remainder."
> (The author's emphasis)

Continuing on, the writer notes that where the confession contains a mention of another crime committed by the accused:

> ". . . this additional crime would originally not be provable for its own sake; yet under the present principle and that of Section 2115 post the accused's allusion to it in his confession may and must be listened if it is a part of the one entire statement confessing the crime charged at bar."
> Id., at §2100, at pp. 497-498.

The Illinois Supreme Court in People v. Hurry (1943), 52 N.E. 2d 173 stated that

> "The rule seems to be well settled that where a conversation or confession is made by a defendant in the criminal case the entire conversation is admissible and if therein it appears from his own statement that he had committed other crimes, does not amount to proof that another crime had been committed as a substantive fact but is merely proof of the defendant's entire conversation."

A similar result was reached by the Colorado Supreme Court sitting en banc in Graham v. People (Col. 1956), 302 P. 2d 737.

Following full advice and waiver (Miranda v. Arizona, supra.), petitioner gave a statement to police which included his explanation that the trip to Cincinnati (made shortly after the homicide) was to see his parole officer. In context, with the overwhelming proof of petitioner's guilt, any error in admitting that portion of the statement was harmless beyond a reasonable doubt. Chapman v. California (1967), 386 U.S. 18.

It is respectfully submitted that the Writ of Certiorari should not be issued on this question.

III. CONSISTENCY IN THE VERDICT IS NOT REQUIRED BY THE DUE PROCESS CLAUSE AND EACH COUNT IN AN INDICTMENT IS REGARDED AS IF IT WERE A SEPARATE INDICTMENT.

It is well established that "consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." Dunn v. United States (1932), 284 U.S. 390 at 393. See Borum v. United States (1932), 284 U.S. 596; Hamling v. United States, 418 U.S. 87, 101 (1974). See generally, 18 A.L.R. 3d 274 and extensive citation therein.

The law in Ohio has been consistent with this general principle for a number of years. For example, in Griffin v. State (1868), 18 Ohio St. 438 the court characterized an objection to inconsistencies in the jury's finding with respect to separate counts of an indictment as "technical", and continued:

> "[A] technical answer to it is sufficient. As we have already said, the theory of the law is, that each count of the indictment charges a distinct offense; hence it follows, that the finding of the jury as to a particular count is independent of and unaffected by the finding upon another count."
> 18 Ohio St. at 445.

As stated by this Court in Hamling v. United States, supra., at page 101, "It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required.

It is respectfully submitted that no constitutional issue is presented herein and that the Writ of Certiorari should not issue on this question.

IV. SUBSTITUTION OF AN ALTERNATE JUROR FOR A JUROR WHO HAS READ A NEWSPAPER ACCOUNT OF THE CRIMINAL TRIAL PROCEEDINGS DOES NOT COMPROMISE A DEFENDANT'S RIGHT TO A FAIR TRIAL WHERE THE REMAINDER OF THE PANEL AND THE ALTERNATE JUROR HAVE NOT READ THE NEWSPAPER ACCOUNT.

During the weekend following the first week of trial, a local newspaper reported that the victim's daughter had identified petitioner in court as the assailant. In fact, the testimony was given during a voir dire examination of the witness out of the hearing of the jury. At trial, the witness was unable to identify petitioner in court. Petitioner had altered his appearance by dying his hair and changing the style of his hair. The witness did identify a picture of petitioner as being the picture of the assailant which she had identified some days after the crime.

Trial resumed on Monday and the jury was polled by the trial judge as to whether any juror had read the article. One juror and one alternate juror had read the account. No other jurors had read the article nor were they aware of its contents. Both jurors were excused and a second alternate seated.

There is no indication that petitioner's right to a fair trial was compromised. Nothing approaching the circumstances of Sheppard v. Maxwell, 384 U.S. 333 (1966) is presented herein. The trial judge adequately protected the petitioner's right to fair trial by excusing the juror who had read the news article.

It is respectfully submitted that the Writ of Certiorari should not issue on this question.

CONCLUSION

For the reasons advanced in the foregoing brief, it is respectfully submitted that the petition should be granted and judgment vacated only insofar as it leaves undisturbed the death penalty imposed and the case remanded to the Supreme Court of Ohio for further proceedings. Lockett v. Ohio, 430 U.S. _____ (1978).

It is further respectfully submitted that the Writ of Certiorari should not issue on other questions presented herein.

Respectfully submitted,

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